No. 10573

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MERCHANTS TRANSFER & STORAGE CO. ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

F. P. KEENAN,
Special Assistant to the Attorney General,
Seattle, Washington.

VERNON L. WILKINSON,
LAWRENCE VOLD,
ROGER P. MARQUIS,
Attorneys, Department of Justice,
Washington, D. C.

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OPINIONS BELOW

The district court's oral opinions denying an order of immediate possession and Re: Plea to Jurisdiction appear in the Record at pp. 177–186, 191–192 and 195–197, respectively. A revised form of these two opinions is published in 51 F. Supp. 905. The court's oral opinion Re: Contempt Proceedings appears in the Record at pp. 198–204, 208, 210, 211–215.

JURISDICTION

This is an appeal in a condemnation case from an order, entered September 21, 1943 (R. 51–52), requiring the United States forthwith to return to the condemnee possession of property, and providing that if upon entry of the order for the return of the property possession is not forthwith restored the United

States will be assessed as for contempt the amount of damages suffered by the condemnee from day to day while possession is withheld. Notice of appeal was filed September 27, 1943 (R. 55–56). The jurisdiction of the district court was invoked under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241 and April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171; the Act of March 27, 1942, 55 Stat. 177, 50 U. S. C. App. sec. 632 (Second War Powers Act, Title II); and the Act of July 1, 1943, Pub. No. 108, 78th Cong. The jurisdiction of this Court is invoked under sections 128 and 129 of the Judicial Code, 28 U. S. C. secs. 225 (a) and 227.

STATUTES INVOLVED

The pertinent provisions of the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; of the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a; and of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App. sec. 632; are set out in the Appendix.

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to order the United States to surrender possession of property under penalty of damages "as for contempt."

2. Whether the United States has authority under the Second War Powers Act to take possession of property when, in condemnation proceedings, the federal district court has denied a motion for an

order granting immediate possession of such property.

3. Whether the finding of the district court (that the determination of the Acting Secretary of War that the immediate possession of the property was necessary to the interest of the Government was arbitrary and capricious) is supported by evidence. And, if so,

4. Whether the court abused its discretion in denying leave to present additional evidence.

STATEMENT

On July 29, 1943, the Acting Secretary of War requested the Attorney General to institute proceedings to condemn a term for years in described property in Seattle, Washington (R. 155, 167–169). The request further stated (R. 168):

> The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), supra, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

Pursuant to this request, the Government's petition in condemnation was filed August 2, 1943 (R. 3–7). After referring to the Acting Secretary's request for immediate possession, the petition prayed that the condemnation be adjudged for public use, that the

court enter an order granting immediate possession, and that the compensation to be paid and the parties entitled thereto be ascertained and determined (R. 6–7). Two days later Merchants Transfer & Storage Company, the lessee of the property, moved to dismiss on the grounds, among others, that "The petition fails to show that public necessities can be served by such taking" (R. 11–12).

On August 4, 5, and 7, 1943, hearings were held on the request for an order of immediate possession. At the conclusion of the evidence, the court orally announced its opinion in which it concluded that immediate possession should not be granted (R. 177–195). Findings of fact and conclusions of law were entered on August 13, 1943, holding, in conformity with the views already expressed in the oral opinion, that the Government had acted arbitrarily and capriciously and that the taking of immediate possession was not a wartime necessity (R. 12–21). At the same time an order was entered denying the Government's motion for an order of possession (R. 21–22). The court did not, however, dismiss the petition in condemnation.

Thereafter, on September 8, 1943, officers of the Army took possession relying upon authority under the Second War Powers Act (R. 25, 30–32). The occupant of the premises—Merchants Company—was not ousted, but was permitted to liquidate the goods it had in storage, only being prevented from putting more goods in storage (R. 36, 207). Merchants and the owner of the property thereupon filed a petition "for rule and attachment in re: contempt," asking

that a rule and attachment issue for contempt against specified government officers and that possession be restored forthwith (R. 23–36). An order to show cause why such petition should not be granted was issued, and, as provided in the order, was served on the government officials by telegram and mail (R. 39–42). The Government filed a "plea to jurisdiction" (R. 43), and the officers each moved to quash and vacate the show cause order (R. 44–48).

Hearing was had on September 20, 1943, at which the court declined to take any action against the government officers but held otherwise as to the United States. Accordingly, the order appealed from was entered September 21, 1943 (R. 49–53). This order first denies the rule and attachment for contempt as to the individuals. It then orders the United States to vacate the premises and orders that if possession is not restored "then the United States of America will be later assessed as for contempt damages" (R. 52). Notice of appeal was filed on September 27, 1943 (R. 55–56) and on September 28, 1943, this Court entered its order staying operation of the order of September 21, 1943, pending this appeal.

The evidence produced at the hearing on August 4–7, 1943, and the views of the court as expressed at that time and at the subsequent hearings may be summarized as follows:

On August 4, 1943, the Government adduced the testimony of two witnesses, Lieutenant-Colonel Harry H. Watson, Supply Officer of the Army Transport Command, and J. Stanley Mullane, Associate Land Appraiser in the Seattle office of the Real Estate

Branch of the United States Army Engineers (R. 73–76). Watson described the property as a four-story frame building and part basement entirely surrounded by lands and other buildings already in possession of the Port of Embarkation. He said that the property was needed for the storage of military supplies, including repair parts for ships, such as pipes, castings, fittings, boiler plates, and other heavy metal objects and also various items used for outfitting and supplying vessels; that the Port of Embarkation had no storage space for such purposes; that the volume of military traffic through the Port was increasing rapidly; and that possession of the property would be absolutely required within the next thirty days. On cross-examination, in response to a question from the court, he also said that the pipes, castings, and fittings could be stored outside temporarily but not permanently. Mullane also testified that the property was entirely surrounded by property owned by the United States. On cross-examination, he said that a term for years ending June 30, 1944, was being taken because that date is the end of the fiscal year and Congress allots funds from year to year. Over objection by government counsel, he was permitted to state that he knew of no place to which Merchants Transfer & Storage Company could move. He further testified that there was no room in the Port of Embarkation for construction of additional buildings, particularly in the area of the warehouse in question.

The appellees first showed that in February, 1941, the premises had been leased to Merchants (R. 77–88).

They then put five witnesses on the stand, J. A. Clark, Seattle manager of the Parrot & Co., food brokers; A. E. Hullin, of the Hullin Transfer Company and president of the Washington State Warehousemen's Association; M. M. Houck, Assistant District Manager at Seattle of the Great Atlantic & Pacific Tea Co. and of Nakat Packing Co.; Leon H. Herkenrath, manager of a warehouse in Seattle; and Sam C. Horner, Secretary-Treasurer of the Merchants Transfer & Storage Company (R. 89–116). Clark said that without the warehouse facilities of the Merchants Transfer & Storage Company the U. & T. Sugar Company, which his firm of brokers represented, could not hope to deliver and supply the Seattle district with sugar. Hullin said he knew of no place Merchants Transfer could move to if it was required to vacate the building in question. Houck of the Great Atlantic & Pacific Tea Co. testified that he knew of no other warehouse that could take care of the business of his company in distribution of food supplies to the civilian population. Herkenrath said that he also knew of no place Merchants Transfer could move to. Horner of Merchants Transfer described the function of his company in regard to the storage and distribution of food supplies to the civilian population and armed forces and said no space was available elsewhere in Seattle to carry on the business. He also testified that although the Army had notified him in September of 1942 that the warehouse would be needed for Army use, it had not then been taken over. Other witnesses for Merchants Transfer testified to the lack

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of available warehouse space to which the company could move, that no material was available for construction of a new warehouse, and that if there were it would take from four to five months for construction (R. 117–121).

Harry T. Meyers of the United States Army Engineers was called in rebuttal (R. 121–166). He testified that if the Army was not put in immediate possession of the warehouse, it would in his opinion materially impair the successful prosecution of the war effort; that the Goodrich warehouse which the Government had previously acquired had been used for transit storage but was being remodeled into office space; and that the warehouse in question was the last piece of property within the Port of Embarkation not owned by the Government, and it was important from the standpoint of sabotage prevention and fire protection that it be acquired and the whole Port enclosed by a fence and placed under rigid guard (R. 124–132). He also said that the main mission of the Port of Embarkation was to ship cargo, troops, and equipment, and that the success of that mission depended upon the rapid and efficient movement of vessels and upon reducing the turn-around time of vessels between overseas ports and the Port of Embarkation; that to reduce the turn-around time, a marine repair shop had to be maintained so that repairs could be made on ships that do not require drydocking while berthed at the Port; and that supplies must be kept immediately available for this repair work (R. 132–135). In response to questions from the court, he said that he knew of no commercial pier in Seattle which followed the same practice of

making repairs while ships were at berth; and that ordinary ship stores could be stored under pier sheds on the docks, but that, because the operations of the Port of Embarkation must be kept elastic, nothing but transit storage was placed in pier sheds on the docks there (R. 135–137). He further testified that the Government and the Port of Embarkation had done everything in its power to utilize all available space in the Port without disrupting the functions of the Merchants Transfer building until it became essential to do so, pointing out for over a period of a year the Government had been acquiring other properties but had left that building to the last; and that all available space in the Port was being efficiently used (R. 137–142). On cross-examination, over objection of Government counsel, he was asked why, if it was so essential to War Department to have this property, was the taking of the lease only and not of the property itself; and he replied that the Secretary of War had determined that (R. 143–145). He also stated that a warehouse previously taken over was being used generally for office space (R. 145–146). On redirect examination, he explained that there was a shortage of critical materials for new construction and that the War Department determined it more expedient to convert warehouse space to essential office space (R. 149–151). Upon the conclusion of this witness' testimony, the Government moved for an order of immediate possession (R. 175).

Thereupon the court orally announced its opinion on the motions for dismissal and for immediate possession. It said that as the hearings progressed it be-

came clear that appellee's position was that the Government acted arbitrarily and capriciously in selecting the warehouse for condemnation and possessory proceedings; that in deciding this issue the court must consider all the facts and circumstances, including the relative necessities of the Army to have possession of the property for military purposes and of the civilian population to have it used for storage and distribution of food supplies and whether the warehouse space already acquired by the Army is being used efficiently or after being acquired has been converted to other than warehouse purposes, thus indicating that the Government did not then need and does not now need additional warehouse space; and that it should also be particularly considered whether supplies, such as metal pipes and fittings and ship-repair parts, might not as well be stored on premises already owned by the Government and whether the Government's action might not be influenced by considerations of mere convenience as regards police protection and fire control. The court then said (R. 182–183):

> The truth is that the Army does have a lot of warehouse space nearby, and has had other warehouse space which has been converted to uses other than warehouse and storage uses.
>
> The evidence is that so far as service to the civilian public is concerned, there isn't any other service which is comparable to this and that this warehouse and storage service is practically indispensable to the public.
>
> I believe the court could more easily resolve this question were it not for the circumstance that part of the valuable warehouse and storage

space used for storage before acquisition by the Government has, after acquisition by the Government, been converted to office space. That is a strong circumstance that naturally leads to the inquiry: What use, in fact, is the Government going to make of this space after it gets it; will it use it to store this iron pipe and metal pipe fittings and consumable ships stores or will it after days or weeks convert this warehouse to other purposes such as office uses? That inquiry might just as well be made as to this property now as it could have been made as to the other warehouse property before the Government acquired it and converted it to office use. The evidence is undisputed that the former State Liquor Warehouse and the Russell Warehouse were actually converted into office uses after they were condemned by the Government during this war.

* * * * *

(R. 183–184):

Upon a consideration of all of the evidence before the Court on this issue, I have no hesitancy in saying I do not believe that it is necessary for the war effort that the Government now acquire this warehouse as a place to store metal pipe, metal pipe fittings, metal repair parts for ships, and ships consumable stores. Everyone knows that such property is customarily stored in any kind of a building. Some of it is stored outside. Some of those metal goods are often stored outside for a limited or longer period of time; and ships consumable stores may be stored in any kind of a building that has a shelter over it such as docks and ordinarily is stored on any dock in Seattle.

So far as having these kinds of property, the metal pipe, pipe fittings and the ship repair parts, stored at a place where it can be used on a ship while it is lying at any berth,—for instance a berth at the Port of Embarkation—, there is no showing here that that is a situation any different than that attending private operation of ships.

* * * * *

(R. 185)

The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man who may have made an appraisal or an inspection or a report. Rather the Court's conclusion is more the result of the Government's past action in converting good warehouse space into office uses, and of the possibility that in view of past acts in respect to similar property the Government may change its program as to this property tomorrow.

* * * * *

(R. 186)

And the Court is of the opinion, and finds and concludes, that such action of the Government in this particular case, in the light of all of the evidence here introduced and above discussed, is capricious and is arbitrary, and therefore the Court declines to enter an order granting to the Government leave to take possession of this property as requested by the Government.

At this point in the court's oral announcement of its opinion, counsel for the Government inquired whether there was not a misconception of the United States' evidence as to the military necessities and as to the use for which the warehouse was needed and asked leave to present additional evidence on this point (R. 187). This request was denied, the court saying (R. 191–192):

> But I am going to say to you frankly what I consider to be the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case, and in favor of the Respondent's position in this case, and that is that in two instances the Government has acquired already in this neighborhood, and in one instance very near this property, at least two separate warehouse properties, and afterwards it converted them away from warehouse and storage use to office use.
>
> * * * * *

(R. 192)

> I think what is needed here is an expression by an appellate court binding upon this Court as to whether or not this Court has any discretion to search into the issue of arbitrary and capricious action on the part of the Government in a case like this.

Thereafter, in connection with the hearings in September the court made a further pronouncement of its opinion on the request for immediate possession, this being the opinion entitled in the Record as Re: Plea to Jurisdiction (R. 195–197). It adhered to the views

expressed on August 7, 1943, as to the right of the Government to an order for immediate possession and went on to say that the Government in effect was contending that (R. 196):

> as to administrative acts of Government War Department officials under the Second War Powers Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.

The court thereafter added that (R. 197):

> I think it is proper to comment that in the previous proceedings the Government voluntarily appeared and filed its petition for, among other relief, immediate possession of this warehouse property. The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken. I believe the Constitution makes it plain that there goes with the right which the Government has to condemn private property for public use a duty to justly compensate the owner for it. Up to this time there has not been anything said or done nor has any step been taken by the Government for determining just compensation in this case.

At the September hearing the court also stated its views concerning the contempt proceedings. It first concluded that the individual government officials were

not chargeable with contempt (R. 198–203). As to the United States, the court stated (R. 202):

> * * * The United States, in the Court's opinion, has taken possession of this property without right. It has done so unlawfully, and I think that the United States should be made, in a proper proceeding, to respond in damages as for a contempt for failure to comply with the Court's order, if and when made, for the Government to return possession to those entitled to it. * * *

(R. 203–204):

> * * * The taking of possession of this property, though, the Court repeats, by the United States, after this Court denied its motion for leave to take possession, is contrary to the right of the property owner and it seems to me that if that is persisted in, will be the kind of an act which if done by a private person would justify the Court in adjudging contempt. I do not know whether the United States will continue in possession or not. If the Court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation. I do not know what it might wish to do. That is for the United States to decide, but upon a proper application, or upon proper motion therefor, this Court suggests that it will enter an order directing the United States to forthwith return this property to those who were in possession of it when the United States unlawfully took it.

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Further discussion followed during which the court summarized the terms of the order it proposed to enter and stated (R. 208):

> I want to say in making this order that it is without prejudice to any right the Government may have to file either in this proceeding or in a new proceeding a declaration of taking with a deposit for just compensation.

The question whether provision for payment of compensation had been made was discussed at a short hearing on October 4, 1943 (R. 211–215). Government counsel then stated that the owners could at any time request a trial as to compensation but the court disagreed (R. 214–215).

SPECIFICATIONS OF ERROR

The district court erred:

1. In entering its order of September 21, 1943, directing the United States to vacate the premises under penalty of contempt damages.

2. In holding that the taking of possession was unlawful and without right.

3. In holding that the taking of possession was arbitrary and capricious.

4. In holding that the taking of possession was not necessary.

5. In denying the Government's motion for leave to re-open the cause and present additional evidence. This motion was as follows (R. 187): "At this time the Government asks leave to re-open and recall Major Meyers to the stand to make a further showing as to the use to which this property will be put."

6. In denying the Government's motion for an order of immediate possession.

ARGUMENT

I

The district court lacked jurisdiction to order the United States to surrender possession under penalty of damages "as for contempt"

The order of September 21, 1943, directs that the United States "forthwith, upon the entry of this order, vacate said premises" and provides that if possession is not restored "then the United States of America will be later assessed as for contempt damages" (R. 52). Clearly, the court had no jurisdiction to enter such an order.

The United States can, of course, be sued only so far as Congress has consented. With minor exceptions, it has never consented to the issuance of mandatory injunctions against it. *United States* v. *McLemore,* 4 How. 286 (1846); *Hill* v. *United States,* 9 How. 386 (1850); *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.* 245 U. S. 493, 504 (1918). The court below did not refer to any statute authorizing such injunction in the instant case and none is known. Although this fact was called to the attention of court in the Government's "plea to jurisdiction" (R. 43), it is not referred to by the court below in its opinion overruling that plea (R. 195–197).

The fact that the order was entered in condemnation proceedings instituted by the United States does not alter the situation. "The objection to a suit against the United States is fundamental, whether it

be in the form of an original action or a set-off or a counter-claim." *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106 (1924); *United States* v. *Shaw,* 309 U. S. 495 (1940); *United States* v. *United States Fidelity Co.* 309 U. S. 506 (1940). As the court said in the *Fidelity Co.* case (p. 514): "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."

No such consent may be implied from the condemnation statutes. In *Moody* v. *Wickard,* 136 F. 2d 801 (App. D. C. 1943) certiorari denied 320 U. S. — (October 25, 1943) condemnation proceedings, which did not invoke the Declaration of Taking Act, were brought to acquire property of which the United States had already taken possession. The court entered a personal money judgment against the United States. The Court of Appeals for the District of Columbia held that the taking of possession did not justify such a judgment, which was therefore void for lack of congressional consent. Thus, unless the Government invokes the Declaration of Taking Act, the condemnation court lacks jurisdiction to enter a money judgment against the United States. *Cf. New York Telephone Co.* v. *United States,* 136 F. 2d 87 (C. C. A. 2, 1943. The remedies which might be available under the Tucker Act are irrelevant here, for Tucker Act claims cannot be joined with condemnation proceedings. *New York Telephone* case, *supra; United States* v. *Sherwood,* 312 U. S. 584 (1941). It obviously follows that the court below lacked authority to enter the mandatory injunction directing the re-

turn of the property or, alternatively, the payment of money damages.

II

The United States is authorized to take possession of property without court order

The court below took the view that the United States "has taken possession of the property in issue unlawfully and without right" (R. 51). In the interest of orderly procedure the Government has pursued the policy of applying to the court for an order of immediate possession as was done in the instant case. *Cf. City of Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942). However, it is clear that such order is not necessary and the Government is empowered to take possession without court action.

A. *The Second War Powers Act specifically authorizes the taking of possession without court orders.*—Title II of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, provides that "Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law." The language of the Act is plain. The previous sentence of the Act authorizes "The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation" to acquire property "that shall be deemed necessary for military, naval, or other war purposes" and dispose of it. Obviously it is those officers, not the court, which will occupy, use and improve the prop-

erty. The expression "immediate possession may be taken" is a parallel structure to "the property may be occupied, used and improved." In both instances, the action is taken by the government officer. The Act provides that upon or after the filing of the petition, possession may be taken. Thus, the only limitation upon taking possession is that a condemnation petition be filed. There is no requirement that a hearing be held or a court order be obtained nor is there any language to justify the imposition of such limitations upon the power to take immediate possession. Thus, the statute is unambiguous and specifically authorized the taking of possession in the instant case. The request of the Acting Secretary of War that proceedings be instituted and the petition of condemnation both referred to the Second War Powers Act (R. 167, 4). Nevertheless, the court below made only passing mention of the Act and did not indicate any reason why it does not apply here.

Any doubt as to the meaning of the Second War Powers Act disappears when the circumstances under which it was enacted and its legislative history are considered. The first general federal legislation concerning eminent domain was the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 258, which provided for conformity to local practice. Under this provision the taking of possession and commencement of construction was often long delayed because many states permitted such taking only after compensation had been paid. This delay became important during the first World War resulting in the Act of July 2, 1917, c. 35, 40 Stat. 241, 50

U. S. C. sec. 171, authorizing the taking of immediate possession in condemnation proceedings brought by the Secretary of War to condemn lands for specified war purposes. During the first World War the procedure of an administrative taking without court proceedings was frequently employed, the owner being relegated to a suit under the Tucker Act to recover compensation. See e. g. *Campbell* v. *United States,* 266 U. S. 368, (1924); *United States* v. *North American Co.* 253 U. S. 330 (1920). This was essentially the procedure under the Lever Act which provided for an administrative taking and estimate of compensation. If the owner was dissatisfied with the estimate he could withdraw three-quarters thereof and bring suit for the balance. See e. g. *Luckenback S. S. Co.* v. *United States,* 272 U. S. 533 (1926); *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299 (1923).

In the years following the first World War the need for an orderly procedure for the immediate taking of possession became evident. In some cases a court order for such possession was obtained, but not without dispute. See e. g. *Commercial Station Post Office* v. *United States,* 48 F. 2d 183 (C. C. A. 8, 1931). And, in other instances, statutory provision was made for the procedure to be followed in taking immediate possession. See e. g. River and Harbors Act of July 18, 1918, c. 155, 40 Stat. 911, 33 U. S. C. sec. 594; Mississippi River-Flood Control Act of May 15, 1928, c. 569, 45 Stat. 536, 33 U. S. C. sec. 702d. In order to expedite the construction of public works the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a–f, was passed.

That Act permits the United States to file a declaration of taking in pending condemnation proceedings. Upon the filing of the declaration and the deposit of estimated compensation title passes without court order. *City of Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942). The Act further provides that "upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."

This procedure is adequate to fulfill the Government's needs during peacetime. And it has been followed whenever possible during the present war. However, even this procedure causes delay which, in particular instances, seriously impedes the prosecution of the war. The constant technological advances and changes on the world-wide battlefronts produce changes in the requirements of the Army, Navy, and other war agencies almost overnight. Before a declaration of taking can be filed, appraisals must be made as a basis of the estimate of compensation. A description of the property must be prepared and carefully verified, because the Government is compelled to pay for property included in the declaration by mistake. *United States* v. *Sunset Cemetery Co.,* 132 F. 2d 163 (C. C. A. 7, 1942). Delay also occurs between the time the declaration is filed and the possession is awarded.

The Second War Powers Act was passed to avoid this delay. As its title recites, it was enacted "To further expedite the prosecution of the war," 56 Stat. 176. During the hearings on the bill Department of

Justice officials stated: "The purpose of this, Senator, was to avoid the complexity of the present procedure, so that immediate possession of the property, where it was essential for war purposes, could be had, and I think some of the advantage would be lost if you make any administrative procedure necessary there." Statements in Executive Session, S. Committee on Judiciary, S. 2208, 77th Cong., 2d sess. (1942), p. 15; see also p. 7. In reporting the bill, the committee stated that "the principal utility of this title [Title II] is that the Government may obtain immediate possession of property and dispose of such property for war purposses," S. Rept. No. 989, 77th Cong., 2d sess. (1942) p. 4. During the debate Senator O'Mahoney, sponsor of the bill, said with reference to the purpose of the Act (88 Cong. Rec., pt. 1 (1942), p. 623; see also Id. p. 639):

> It is our feeling that we are in a very desperate war, and that it is highly desirable to waive anything that might impede the effort, and that there should be no handicap upon the President, and those who are carrying on the war in doing what may be necessary at the time.

It is, therefore, clear that language of the Second War Powers Act was advisedly used so as to grant specific legislative approval to the taking of possession without court order and without making a deposit. The intention of avoiding the delays incident to use of the declaration of taking procedure was expressed by the provision that possession might be taken "upon * * * filing of the petition," thus avoiding delays caused by service of process, hearings, etc., and was

emphasized by the phrase "notwithstanding any other law." The court below has nullified the plain language and intent of this statute and seeks to make the declaration of taking procedure compulsory. Thus, in overruling the Government's "plea to jurisdiction" the court said that the Government had not taken any steps for determining just compensation (R. 197). And in its opinion "Re Contempt Proceedings" it said (R. 204; see also R. 208, 212):

> If the court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation.

Thus, the conclusion of the court below, that the taking of possession was unlawful was based on the court's view that the United States cannot take possession without making a deposit. Such is the provision of several state constitutions. But, as the Supreme Court has many times held, no such limitation applies under the federal constitution.[1] Thus, the Declaration of Taking Act goes much further than the Fifth Amendment requires. It is not a general limitation upon all condemnation proceedings nor may it be invoked by the condemnee. As the Act provides "the petitioner may file * * * a declaration of taking." It is simply an ancillary procedure which

[1] *Bauman* v. *Ross*, 167 U. S. 548 (1897); *Williams* v. *Parker*, 188 U. S. 491 (1903); *Crozier* v. *Krupp*, 224 U. S. 290 (1912); *Bragg* v. *Weaver*, 251 U. S. 57 (1919); *Joslin Co.* v. *Providence*, 262 U. S. 668 (1923); see *Garrow* v. *United States*, 131 F. 2d 724 (C. C. A. 5, 1942), certiorari denied 318 U. S. 765 (1943).

may be invoked by the Government if it so desires. The fact that the Government has utilized the Act whenever practicable so as to make funds available for payment to the condemnee and a saving of interest to the Government (cf. *United States* v. *Miller,* 317 U. S. 369, 381 (1943) does not mean it can be compelled to do so. When payment is not made prior to the taking of title or possession, the condemnee is compensated by payment of interest. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299 (1923).

Under the district court's view, the Second War Powers Act would mean no more than the Declaration of Taking Act. The plain language of the Act, especially the words "notwithstanding any other law" may not be thus deleted from the statute and the purpose for which it was inserted nullified. The contrary construction is especially unwarranted in view of the fact that war statutes must be liberally construed in order to achieve their legislative purpose that the war may be waged successfully.[2]

B. *Even apart from the Second War Powers Act, the United States, by its authorized officers, may take possession of land without court order.*—The United States is not obligated to make payment in advance of taking property, *supra* p. 24. Consequently, property may be taken without resort to condemnation proceedings. *United States* v. *Lynah,* 188 U. S. 445, 465 (1903); *United States* v. *Cress,* 243 U. S.

[2] *Ex Parte Quirin,* 317 U. S. 1, 25 (1942); *Hirabayashi* v. *United States,* 320 U. S. 8 (1943); *Highland* v. *Russell Cas. Co.,* 279 U. S. 253, 262 (1929).

316, 329 (1917); *Campbell* v. *United States,* 266 U. S. 368, 370–371 (1924). The owner cannot enjoin the action of the government agents in taking property because he has an adequate remedy at law to recover compensation under the Tucker Act. *Hurley* v. *Kincaid,* 285 U. S. 95 (1932); *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18 (1940). Cf. *Commercial Station Post Office* v. *United States,* 48 F. 2d 183 (C. C. A. 8, 1931). This rule has reference, of course, to situations in which the governmental agent is properly acting in his official capacity. The court below held the officers were so acting in the instant case (R. 199–202). If the officer exceeds his authority as a government agent he may be proceeded against personally in ejectment or for damages. *United States* v. *Lee,* 106 U. S. 196 (1882); *Philadelphia Co.* v. *Stimson,* 223 U. S. 605 (1912); *United States* v. *North American Co.,* 253 U. S. 330 (1920); *New York Telephone Co.* v. *United States,* 136 F. 2d 87 (C. C. A. 2, 1943).

Thus, the United States has authority to take property without resort to judicial proceedings and the landowner is relegated to a suit under the Tucker Act. This power has been exercised on many occasions. It was adopted as a policy to be followed during the last war in the Lever Act, see *supra.* The Declaration of Taking Act and the Second War Powers Act provided for procedures whereby compensation will be determined in the court where the land is situated, whereas the Tucker Act requires that claims for more than $10,000 be litigated in the Court

of Claims (28 U. S. C. sec. 41 (20)).[3] Thus, both Acts, rather than enlarging the powers of the Government, provide permissive procedures which operate to the landowner's benefit. They do not limit the governmental power, which has always existed, to authorize the taking of property without resort to judicial proceedings. The holding of the court below that the United States "has taken possession of the property in issue unlawfully and without right" (R. 51) was, therefore, plainly erroneous.

III

The taking of possession was not arbitrary or caparicious

In requesting institution of the condemnation proceedings, the Acting Secretary of War stated (R. 168):

> The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of [the Second War Powers Act] you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

[3] The Government called attention to the prayer of the petition in the instant case that "compensation [to] be paid for the appropriation of said estate in said property and that the parties entitled thereto be ascertained and determined" (R. 7). The court below apparently believed that, despite this prayer, the landowners would be powerless to expedite the determination of compensation (R. 214). There is nothing to prevent the court from setting the case for an early trial as to compensation.

Pursuant to this request, the petition prayed that the court grant immediate possession (R. 7). After hearing evidence, the district court declined to grant such order on the ground that the government officers "have acted capriciously and arbitrarily and that the taking immediate possession of the property in the petition described is not necessary" (R. 20). The court purported to recognize the limitations upon the review of the determination of the administrative authority. But, in fact, it simply substituted its own judgment, based upon incomplete information, for that of the Acting Secretary of War.

A. *The necessity of the taking is not subject to judicial review.*—The General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 257, authorizes a government officer to condemn property "whenever in his opinion it is necessary or advantageous to do so." Similarly, the Second War Powers Act authorizes the condemnation of property "that shall be deemed necessary for military, naval, or other war purposes," 50 U. S. C. A. App. sec. 632. These statutes vest in the administrative officer the discretion to determine the necessity of condemnation. *Old Dominion Land Co.* v. *United States,* 269 U. S. 55 (1925); *City of Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942); *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2, 1942) certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698 (1943); *United States* v. *Montana,* 134 F. 2d 194 (C. C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943); *United States* v. *Meyer,* 113 F. 2d

387, 392 (C. C. A. 7, 1940), certiorari denied 311 U. S. 706 (1940). As the court said in the *243.22 Acres* case: "The decision of the Secretary of War is not open to judicial inquiry." And this Court in the *Oakland* case stated: "Where the Secretary of War has proceeded as prescribed by the Act of Congress, the court will not go behind his declaration to inquire into his intentions." Except for the decision in the instant case, no federal court has ever rejected an administrative determination of necessity.

The court below relied entirely on *Carmack* v. *United States,* 135 F. 2d 196 (C. C. A. 8, 1943), which simply held that under the circumstances the appellant should have an opportunity to prove that the Government official had acted "arbitrarily or capriciously." The decision also rested on the ground that the Postmaster General had not concurred in the selection of the post-office site as required by the statute there involved. This decision is not in conflict with those above cited nor does it tend to support the action of the court below in the instant case.

The phrase "arbitrary or capricious" does not mean that the court may investigate the correctness of the administrative judgment. The court below specifically declined to ascribe any bad faith or personal motive in the instant case. It said (R. 178) that the Government is required to proceed in "*constructive* good faith as well as good faith in fact." And it stated (R. 184–185):

> the Court does not say or imply that any particular officer of the Government or any par-

> ticular military man has gone out with a deliberate attempt to act facetiously with respect to the public generally. * * *
>
> The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man * * *.

Thus, the court put aside any notion that the Acting Secretary of War was motivated by personal considerations and, of course, there is not one word of evidence to support any such conclusion. The fact is, therefore, that acting in his official capacity, the Acting Secretary of War determined that the best interests of the Government required the taking of immediate possession of the property here. The contrary conclusion of the court below necessarily means simply that the court disagrees with this judgment. Reference to "constructive good faith" and characterizations of the government action as "arbitrary" or "capricious" cannot change the fact that the court has attempted to review the wisdom of the officer's judgment. That this is what the court did is evident from the factors which influenced its conclusion. Both its findings (R. 12–20) and its opinion (R. 177–186) make it perfectly plain that the court balanced what it considered the military necessities to be against similar civilian necessities. All of the evidence related, not to the factors on which the government official based his judgment, but to the relative requirements of the Army and civilians (see *supra,* pp. 5–9). In its conclusion of law II, after characteriz-

ing the governmental actions as "arbitrary and capricious" the court stated its ultimate conclusion "that the taking immediate possession of the property in the petition described *is not necessary*" (R. 20).

This is precisely the question which is not subject to juidcial review, see *supra,* p. 28. It is not the function of the court to receive evidence from the Government that it needs the property and from the condemnee that he also needs it and that the Government can get along without it and to determine from such evidence whether the Government should be permitted to take it. As the Court said in *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 709 (1923): "The necessity for appropriating private property for public use is not a judicial question." Again "the federal statute (40 U. S. C. A. sec. 257) does not require proof of 'necessity' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." *United States* v. *Montana,* 134 F. 2d 194 (C. C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943). The conclusiveness of the administrative finding of necessity is particularly important during wartime. "The decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies." *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2, 1942).

The instant case aptly illustrates the reason for the rule. The decision of the Acting Secretary of War that "the utmost haste in expediting this project is vital to the successful prosecution of the War" was

made July 29, 1943 (R. 155, 168). The hearings were had before the court on August 4, 5, and 7, 1943. And, on August 7, 1943, the court concluded "I do not believe that it is necessary for the war effort that the Government now acquire this warehouse" (R. 183). The property is needed in connection with operation of the Seattle Port of Embarkation. The obvious function of that port is the dispatch of troops and supplies to the Pacific war theater. Subsequent events indicate the considerations which may fairly be assumed to have influenced the Acting Secretary of War. American forces landed on Kiska August 15, 1943. The battle of Tarawa and occupation of the Gilbert Islands occurred in November. And military operations have been greatly accelerated recently in all the Pacific theater, including the bombing of Paramashiru. Plans for these operations could not, of course, be revealed or even hinted at during the hearing in open court. The furthest the government witnesses could go was to state that increased activity at the port could reasonably be expected and that exclusion from the property would materially impair that war effort (R. 128–129). Thus, a balancing by the court of military necessities against civilian convenience is not only unauthorized but impractical in fact because the military needs can be revealed in public hearings only in the most general terms. As the court has recently stated in *Hirabayashi* v. *United States,* 320 U. S. 81, 93 (1943):

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the

> Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

And as Justice Douglas remarked in his concurring opinion in the *Hirabayshi* case (320 U. S. at p. 106): "We cannot possibly know all the facts which lay behind that decision [of the military]." The very purpose of the Second War Powers Act was to permit the Government to take immediate possession without the necessity of any hearing such as occurred in the instant case. During the debate on the bill, Senator O'Mahoney stated (88 Cong. Rec., p. 623, see *supra* p. 23) "there should be no handicap on the President, and upon those who are carrying on the war in doing what appeared necessary at the time."

B. *In any event, the facts do not support the district court's conclusion that the taking was arbitrary and capricious.*[4]—The property in question was at the time completely surrounded by Government buildings (R. 75, 130). Some of those structures had originally been used for warehouse purposes but after acquisition by the Army had been remodeled for other uses, in-

[4] The usual presumption that the action of government officers is valid, applies to the determination of the Acting Secretary of War; hence the burden was upon appellees to prove that such determination was arbitrary and capricious. *United States* v. *Chemical Foundation*, 272 U. S. 1 (1926); cf. *United States* v. *Parcels of Land in Denton*, 30 F. Supp. 372, 379 (Md. 1939); *United States* v. *23.263 Acres of Land in Pierce County*, 45 F. Supp. 163 (W. D. Wash. 1942). In the court below, appellee's counsel asserted that the burden of proof was upon the Government and the court apparently acquiesced in that view (R. 184, 189).

cluding office space (R. 129, 147–149, 152–153). The property was needed for warehouse space, the first floor to be used for ships stores, and the remainder of the building for supplies, material and equipment for a marine repair shop (R. 132, 134). The taking of the building would also facilitate protection of the port against sabotage and fire hazards (R. 130–132).

The condemnee's evidence largely related to the needs of Merchants Transfer & Storage Co., lessee who was occupying the building. It was engaged in the transfer and storage of many products including foodstuffs. Its customers and other warehousemen testified that no warehouse to which it could move was available in Seattle and that continuation of its business was very important in supplying food in the area.

The court's conclusion was largely based on the fact that other warehouses had been converted to office use. The court referred to this fact as "the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case" (R. 191–192). During the hearing the court expressed the notion that the office work could be done in tents (R. 150–152). But the government evidence was uncontradicted that certain office work was "as essential as cargo" to operation of the Army port (R. 150) and such space was not otherwise available (R. 149). Plainly, the court was not warranted in completely disregarding this evidence, and the findings based upon this notion that the port did not need office space (R. 18–19) are contrary to the evidence.

The other fact upon which the conclusion was based was the finding that the property "could be just as well

cared for out in the open air" (R. 18). This finding likewise disregards uncontradicted evidence. It was based on the statement that the repair parts included metal pipe, metal pipe fittings, and other metal repair parts (R. 18). But the testimony was that thousands of types of supplies ranging from gaskets to steel plate were included (R. 137). This embraced "electrical supplies and various types of communications supplies" (R. 137). Obviously, such articles could not be "just as well cared for in the open air." The witness said (R. 138), "Generally, the supplies stored under coverage are those which would be damaged by the weather or deteriorated rapidly under weather conditions." Moreover, the witness stated that there was no available space in the port (R. 141). This is not a question of conflicting evidence, because the condemnees did not present any evidence concerning the availability of space at the port or the practicability of using unprotected land rather than the warehouse. All the testimony on the subject was given by government officers, principally Major Meyers (R. 121–175). Plainly the court was not justified in disregarding his uncontradicted testimony. Moreover, when the Government realized the position the court was taking it moved to reopen the case to present additional evidence stating (R. 191) "we can furnish plenty of additional evidence as to the details of this storage and to show that a lot of it is uncapable of being left out in the weather." However, the court denied this motion (R. 192). In view of the importance of the matter and in view of the fact that presenting such evidence

would have caused very little delay, it was plainly an abuse of discretion to deny this motion.

Finally, the Court did not deny the right of the Government to condemn nor did it dismiss the petition. It merely denied the application for an order of immediate possession. This was done August 13, 1943 (R. 22). The Government took possession almost a month later on September 8, 1943 (R. 25). In doing so, Merchants Transfer & Storage Co. was not immediately evicted from the premises. The Government permitted it to continue its usual course of business in distributing the merchandise stored in the building and simply prevented Merchants from putting more goods in storage (R. 36, 207). The hearing concerning the contempt proceedings was held September 20, 1943 (R. 198), more than a month and a half after the original hearing. The Government called attention to the fact that there was a difference in circumstances and stated it was prepared "to show in proof why this property is necessary insofar as the facts can be revealed without affecting the public security adversely" (R. 204; see R. 206). Nevertheless, the court based its ruling upon facts shown at the original hearing (R. 205). Here again the failure to receive additional evidence was plainly erroneous.

The injunction order recites the taking of possession was "contrary to this Court's order of August 13, 1943" (R. 51). But the earlier order merely denied the Government's motion for an order of immediate possession (R. 22). It did not purport to restrain the Government from taking possession later. In fact, it recognized that further proceedings of some nature

would be had, for it declined to pass upon the condemnee's motion to dismiss (R. 22). The question presented at the later hearing—whether the Government's administrative taking of possession was illegal—was entirely different from the issue at the first hearing, which was only whether the court in the exercise of its discretion should order immediate delivery of possession. And the circumstances at the time possession was taken were different than they were at the first hearing. The court held that the government officers had not violated the order of August 13 because that order "did not command them either to do or not do anything" (R. 199). This reason applies with equal force to the United States. There was, therefore, no warrant for holding that the taking of possession was contrary to the first order.

CONCLUSION

It is submitted, therefore, that the order of the district court should be reversed, the injunction revoked, and the cause remanded with directions to determine compensation for the term taken.

Respectfully,

NORMAN M. LITTELL,
Assistant Attorney General.
F. P. KEENAN,
Special Assistant to the Attorney General.
VERNON L. WILKINSON,
LAWRENCE VOLD,
ROGER P. MARQUIS,
Attorneys, Department of Justice.

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APPENDIX

The General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.
>
> * * * * *

The Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a, so far as pertinent, provides:

> In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judg-

ment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

* * * * *

Title II of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U. S. C. A. App. sec. 632, provides:

The Act of July 2, 1917 (40 Stat. 241) [Title 50, § 171], entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed

necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) [Title 40 §§ 257, 258], or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712) section [1171 (b) of this Appendix]. Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act [this section and section 171 of Title 50], notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended [Title 33, § 733; Title 34, § 520; Title 40, § 255; Title 50, § 175]."

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